BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF CROW ROOFING & SHEET METAL, INC., Appellant, v. PUGET SOUND AIR POLLUTION CONTROL AGENCY, Respondent.	PCHB Nos. 77-131, 77-142, 77-144, 77-145, 77-146 and 78-4 FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

These matters, the consolidated appeals of eight $250 civil penalties for the alleged violation of Sections 9.03 and 9.11 of respondent's Regulation I, came before the Pollution Control Hearings Board, Dave J. Mooney, Chairman, and Chris Smith at a formal hearing in Seattle on February 2, 3, and 10, 1978. David Akana presided.

Appellant was represented by its attorney, John R. Martin, Jr.; respondent was represented by its attorney, Keith D. McGoffin.

Appellant filed a memorandum; counsel made opening statements.

Having heard the testimony, having examined the exhibits and

having considered the contentions of the parties, the Pollution Control Hearings Board makes these

FINDINGS OF FACT

I

Pursuant to RCW 43.21B.260, respondent has filed a certified copy of its Regulation I and amendments thereto which are noticed.

II

Appellant, Crow Roofing and Sheet Metal, Inc., is located at 9500 Aurora Avenue North in Seattle, Washington. It has been in the vicinity of, or at, its present location since 1951. As a part of its business, appellant provides sealing membranes for building roofs at various job sites in the vicinity of Seattle. In the ordinary course of such business, it transports heated asphalt to job sites in asphalt tankers or asphalt kettles.

III

In 1975 appellant began replacing its asphalt kettles with tankers. The total cost of the equipment changeover was approximately $70,000. Such changeover was in anticipation of a requirement for use of tankers rather than kettles by the City of Seattle. The use of tankers has allowed appellant to save between 40 and 60 percent of its energy costs. Appellant continues to keep kettles in its inventory for use at places where a tanker is not suitable.

IV

Appellant maintains an office, shop, and storage shed on its property. The shop portion of the premises is used to park its equipment, trucks, kettles, and tankers. Appellant owns five tankers

of various capacities, including one 15-ton, two 6-ton, and two 3-ton tankers. The 15-ton tanker is used to pick up and store hot, liquid asphalt and is parked on the premises near a source of 440 volt electricity. Pursuant to fire department regulations, the tankers are parked not closer than 25 feet to appellant's southern boundary line. Because a 1,000 gallon propane tank is located in the middle of the yard, it is not practical, feasible, or safe to move the tankers elsewhere in the yard.

While parked at the premises, an electric heater in each of the 6 and 15-ton tankers keeps any asphalt contained therein liquid. The 3-ton tankers are not electrically heated. Ordinarily, the 6-ton tankers and the 3-ton tankers are used at job sites. These tankers are filled with asphalt from the 15-ton tanker. If work is not expected on the following day, or if cancelled for some reason, the 3-ton tankers are emptied into one of the larger tankers which has an electric heater, to avoid cooling and solidifying the asphalt in the small tankers. When transferring products, asphalt is pumped from one tanker to another through a 2-inch hose which is placed through a 12-inch diameter opening of the receiving tanker. Emissions which occur in the instant matters come from this opening during the transfer operation.

V

Appellant's business is located in an area zoned general commercial by the City of Seattle. Immediately adjacent to the southern boundary of appellant's property is the Central Trailer Park, part of which is also

in the general commercial zone and has been located there for many years.

VI

When the wind is from the north or northwest, some residents in the trailer park have complained to respondent on numerous occasions about the asphalt odor, usually during appellant's transfer operations. In response to each of these complaints, respondent dispatched an inspector to make an investigation. On August 15, 1977 at about 9:00 p.m. in

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1. Section 26.36.010 (amended September 24, 1976) of the Seattle Zoning Code allows appellant's use subject to conditions:

> "All uses permitted in this chapter shall be subject to the following conditions:
> . . .
> (c) Processes and equipment employed and goods stored, processed or sold shall be limited to those which are not objectionable by reason of odor, dust, smoke, cinders, gas, fumes, noise, vibration, refuse matter, or water-carried waste."
> . . . .

Section 26.36.085 (amended March 1, 1974) allows dwelling units in a general commercial zone as a conditional use:

> "The following uses permitted when authorized by the council in accordance with Chapter 26.54:
>
> (a) Dwelling units . . . subject to the following additional conditions:
> (1) When nearby or associated uses and other conditions in the immediate environs are not of the type to create a nuisance or adversely affect the desirability of the area for living purposes.
> . . . .
> (b) Trailer park . . . ."

This Board cannot resolve any dispute arising under the Seattle Zoning Code as between the city, appellant and complainants.

response to a complaint of odor, respondent's inspector visited the Hick's and Wittmier's trailers which are located about five feet from appellant's property line. A "strong asphaltic odor" was noticed both outside the trailers and inside the Wittmier's trailer. The source of the odor came from emissions escaping during the transfer of asphalt from appellant's small tanker to its larger tanker. Shortly thereafter, the inspector experienced a headache and watery eyes. He described the odor as annoying and unpleasant and which made him want to leave the area. Two complainants similarly testified as to the strong odor. One complained of burning eyes and a headache; the other complained of nausea before she eventually left her home. For the foregoing occurrence which resulted in complaints from four citizens, appellant was issued four notices of violation for violating Section 9.11(a) of Regulation I from which followed a $250 civil penalty and the first appeal (PCHB No. 77-131).

VII

On September 7, 1977 at about 4:30 p.m. in response to a complaint, respondent's inspector visited appellant's property where he saw asphalt being transferred from one tanker to another. He took several photographs of a white-colored visible emission and recorded an opacity of 35 to 100 percent from appellant's tanker for eight minutes within a one hour period. Upon seeing the inspector, a resident from the trailer park requested that he investigate a "terrifically strong" odor which had brought her a headache, burning eyes, and burning nose (which effects would last through the night). The inspector visited the complainant's residence and noticed a "strong obnoxious odor" which caused

a burning sensation in his nasal passages and eyes and which made him want to leave the area. He developed a headache which lasted long after he reached his home. The odor originated from appellant's property. For the foregoing occurrence, appellant was issued two notices of violation, one for violating Section 9.03(b)(2) and another for violating Section 9.11(a) of Regulation I, and for which a $250 civil penalty for each violation was assessed and here appealed (PCHB Nos. 77-144 and 145).

VIII

On September 12, 1977 at 4:45 p.m., respondent's inspector visited complainant's mobil home court in response to a complaint received earlier that day. At about 5:30 p.m., appellant was seen transferring asphalt from its tankers. Although visual emissions were less than 20 percent opacity, an intermittent but very strong odor from appellant's property was noticed at 6:00 p.m. and at 7:00 p.m. The inspector experienced a headache, watery eyes, irritated throat, and wanted to leave the area. Such effects lasted even after reaching his home later that evening. Complainant Hicks developed a headache, burning eyes and nose, and finally left the area after 7:00 p.m. Complainant Wittmier experienced watery eyes, congested chest, hoarse voice, and a headache which lasted ten hours. For the foregoing event, appellant was issued two notices of violation, each for violating Section 9.11(a) at 6:00 p.m. and 7:00 p.m., and for which a $250 civil penalty for each violation was assessed and here appealed (PCHB Nos. 77-142 and 146).

IX

On October 4, 1977 at about 4:30 p.m., respondent's inspector conducted a surveillance of appellant's operation as a result of

a citizen's complaint. At the outset, no activity was observed and only a slight odor was detected. After appellant's operation commenced, the inspector detected a strong asphalt odor from appellant's property which was strong enough to cause him to try to avoid it completely. He experienced watery eyes, throat irritation, and a headache which lasted the remainder of the night. Complainant became nauseated, and experienced burning eyes and a headache before eventually leaving her home. The inspector moved to the northwest corner of the trailer park where he saw a white plume rising from appellant's tanker. He recorded an opacity of 30 to 100 percent for a period of 4-3/4 minutes within a period of twenty-one minutes. For the foregoing events, appellant was assessed two notices of violation, one for violating Section 9.11(a) and the other for violating Section 9.03(b)(2) of Regulation I, and for which a $250 civil penalty for each violation was assessed and here appealed (PCHB Nos. 77-148 and 150).

X

On December 23, 1977 at about 8:10 a.m. two of respondent's inspectors visited the trailer park, as a result of a citizen's complaint, and ascertained that an odor was coming from appellant's properties. Although no activity was observed therein, a constant odor which was strong enough to cause one of the inspectors to try to avoid it completely was detected. While interviewing complainant, the inspector developed a headache and eye irritation. Complainant experienced a headache, chest congestion, watery eyes, and mental depression. The inspector did not issue a notice of violation to appellant at that time because he did not feel well. For the violation, a $250 civil penalty was

assessed which resulted in this appeal (PCHB No. 78-4).

XI

Immediately before, during or after each observed violation, respondent's inspector did not notify appellant of his presence or that a notice of violation would be, or was, issued. Appellant was apprised of such violation by certified mail. Appellant was not asked to participate in any odor test, nor was it notified of such prior to the inspector's visits.

XII

Respondent's inspectors have had no classroom training, which includes laboratory work, on the subject of odors. The evaluation of odors by an inspector is a matter of judgment which has not yet been replaced by a reliable machine. In fact, the only widely accepted means to measure both the quantitative and qualitative aspects of an odor is the human nose.

XIII

Appellant's employees are not affected by the asphalt: they do not experience watery eyes, headaches, coughs, tight chests, or other adverse reactions. Union representatives for roofers do not themselves feel, nor have they heard complaints of, adverse reactions from asphalt odor.

XIV

Appellant uses the newest and best available equipment for its business. Notwithstanding this, it is still necessary to observe the level of asphalt in the tank to avoid spillage and possible injury to an employee or damage to the equipment during transfer operations.

Appellant has unsuccessfully attempted to shield the complainants' trailers by placing a large plastic screen between the tanker and the trailers to disperse the odor. Such attempt has cost it $400.

XV

Since appellant has switched from kettles to tankers, the owners of the surrounding business activities nearby appellant's premises have not noticed unpleasant asphalt odors even though the prevailing wind carries odors in their direction most of the time. At most, persons from such surrounding businesses have detected odors which were quite minor.

XVI

Any Conclusion of Law which should be deemed a Finding of Fact is hereby adopted as such.

From these Findings come the following

CONCLUSIONS OF LAW

I

Section 9.11(a) of respondent's Regulation I provides that:

> It shall be unlawful for any person to cause or permit the emission of an air contaminant or water vapor, including an air contaminant whose emission is not otherwise prohibited by this Regulation, if the air contaminant or water vapor causes detriment to the health, safety or welfare of any person, or causes damage to property or business.

Section 9.03(b)(2) of respondent's Regulation I provides that:

> "(I)t shall be unlawful for any person to cause or allow the emission of any air contaminant for a period or periods aggregating more than three (3) minutes in any one hour, which is:

. . . .

(2) Of such opacity as to obscure an observer's view to a degree equal to or greater than does smoke [which is darker in shade than that designated as No. 1 (20% density) on the Ringelmann Chart] . . . ."

II

Asphalt odor and visible emissions are an "air contaminant" within the meaning of Section 1.07(b) of Regulation I. The presence in or emission into the outdoor atmosphere of such air contaminant "in sufficient quantities and of such characteristics and duration as is, or is likely to be, injurious to human health, plant or animal life, or property, or which unreasonably interferes with enjoyment of life and property" is air pollution. Section 1.07(c and j).

III

There is no requirement in issuing a notice of violation or in assessing a penalty under Section 3.29 of Regulation I that the violation be "knowingly" caused or permitted. E.g. Kaiser Aluminum, et al. v. PSAPCA, PCHB No. 1017.

IV

Sections 9.11 and 9.03 are within the authority granted respondent by the Clean Air Act. RCW 70.94.141; 70.94.331; 70.94.380. Moreover, respondent must adopt regulations which are no less stringent than state standards. RCW 70.94.380. In implementing the Act, the state has adopted regulations which appear to be embodied in respondent's regulations. Chapter 18.04 WAC (superseded by chapter 173-400 WAC).

V

The evidence presented was that respondent's inspectors and complainants of the trailer park noticed an objectionable odor which caused them to have certain adverse physical effects when the wind came from the north or northwest. The prevailing wind is from a south-southwesterly direction. Other evidence presented was that other persons in establishments surrounding appellant's property did not feel that the odor was objectionable. Union representatives and appellant's employees testified similarly. Whether a violation of Section 9.11 has occurred under such circumstances is necessarily a subjective determination. The Agency must show by a preponderance of the evidence that an air contaminant caused detriment to the health, safety or welfare of any person or caused damage to property or business. The fundamental inquiry is whether the air pollution is of such characteristics and duration as is, or is likely to be, injurious to human health, plant or animal life, or property, or which unreasonably interferes with enjoyment of life and property. Cudahy Co. v. PSAPCA, PCHB No. 77-98 (1977). In weighing the evidence in these matters, there is adequate proof that significant detriment to health and welfare, and/or unreasonable interference with enjoyment of life and property, was caused or allowed to others by appellant at each of the times and dates alleged. As such, appellant was shown to have violated Section 9.11(a) of Regulation I for which six (6) $250 civil penalties (Nos. 3452, 3494, 3497, 3504, 3524 and 3631) assessed were proper and each should be affirmed.

VI

Appellant violated Section 9.03(b)(2) of Regulation I on September 7 and October 4, 1977 by causing or allowing the emission of an air contaminant for a period aggregating more than three minutes in any one hour which was greater than 20 percent opacity on each of such days. The two (2) $250 civil penalties (Nos. 3493 and 3523) assessed therefor were proper and should be affirmed.

VII

Respondent's Section 3.05(b) does not require notice to appellant that an investigation of an alleged violation is about to occur.

VIII

This Board has no jurisdiction to decide substantive constitutional issues and must presume statutes and regulations to be constitutional. See Yakira Clean Air v. Glascam Builders, 85 Wn.2d 255, 257 (1975).

IX

Appellant's remaining contentions are without merit.

X

Any Finding of Fact which should be deemed a Conclusion of Law is hereby adopted as such.

From these Conclusions, the Pollution Control Hearings Board enters this

ORDER

Each $250 civil penalty (Nos. 3452, 3493, 3494, 3497, 3504, 3523, 3524 and 3631) is affirmed.

DATED this 24th day of February, 1978.

POLLUTION CONTROL HEARINGS BOARD

DAVE J. MOONEY, Chairman

CHRIS SMITH, Member